Supreme Court, U.S.
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No. 02-599

In the Supreme Court of the United States

SHEILA FOSTER ANTHONY AND
LISA FOSTER MOODY, PETITIONERS

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

The Freedom of Information Act's Exemption 7(C) protects from disclosure "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). The questions presented by the petition are:

1. Whether the court of appeals correctly held that a FOIA requester need not offer evidence to support his assertion that release of law enforcement records is necessary to vindicate a public interest in determining whether there was government misconduct, and that, if the requester offers such evidence, the court does not have to weigh it.

2. Whether the court of appeals erred in ordering release of photographs without finding a nexus between the specific photographs and the public interest alleged to justify their release.

3. Whether the court of appeals correctly held that public release of law enforcement records that are not "graphic, explicit, and extremely upsetting" would not invade the survivors' privacy.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	5
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Accuracy in Media, Inc. v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000) 3

Vaughn v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) 4

Statutes:

Freedom of Information Act:

5 U.S.C. 552 2

5 U.S.C. 552(b)(7)(C) 2, 3, 4, 5, 7

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OPINIONS BELOW

The per curiam order of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but it is *reprinted in* 37 Fed. Appx. 863. A prior opinion by the court of appeals in this case (Pet. App. 8-44) is reported at 217 F.3d 1168. The orders of the district court (Pet. App. 5-7, 45-58) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 6, 2002. Petitions for rehearing were denied on August 16, 2002 (Pet. App. 4). The petition for a writ of certiorari was filed on October 16, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Freedom of Information Act (FOIA), 5 U.S.C. 552, exempts a variety of categories of information from the government's general duty of disclosure. One such category, described in FOIA Exemption 7(C), consists of "records or information compiled for law enforcement purposes" if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C).

2. This FOIA suit arises from the July 1993 suicide of Deputy White House Counsel Vincent Foster. Foster was found dead in Fort Marcy Park in McLean, Virginia. The United States Park Police conducted the initial investigation of Foster's death and took color photographs of the death scene, including ten pictures of Foster's body. Investigations by the Park Police, the FBI, and congressional committees in both the House of Representatives and Senate concluded that Foster committed suicide. Pet. App. 9, 28-30.

The Office of Independent Counsel twice investigated Foster's death, first through Independent Counsel Robert Fiske, Jr., and later through Independent Counsel Kenneth Starr. Pet. App. 9, 28-30. Mr. Fiske issued a 58-page report concluding that the "overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide." *Id.* at 28 (citation omitted). Three years later, Mr. Starr filed a 114-page report that concurred with the conclusion of every other investigation, explaining that "[t]he available evidence points clearly to suicide as the manner of death." *Id.* at 31 (citation omitted).

3. A public-interest group, Accuracy in Media, filed a FOIA request with the Park Police seeking the autopsy photographs and death-scene photographs of

Foster's body. The government declined to provide the photographs. The Court of Appeals for the District of Columbia Circuit sustained that decision, holding that the photographs are exempt from mandatory disclosure under FOIA Exemption 7(C). *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000).

4. Respondent Allan Favish, who was an attorney for Accuracy in Media in the D.C. Circuit case filed his own FOIA request for the ten death-scene photographs, seeking them from the Office of Independent Counsel. The Office withheld them under Exemption 7(C). Favish filed suit in the Central District of California. The district court initially sustained the government's invocation of Exemption 7(C). Pet. App. 45-58.

A divided Court of Appeals for the Ninth Circuit reversed and remanded the case. Pet. App. 8-44. The court agreed with every other circuit court to address the question that "the personal privacy in the statutory exemption [Exemption 7(C)] extends to the memory of the deceased held by those tied closely to the deceased by blood or love." *Id.* at 16. The court noted that the Office of Independent Counsel had represented to the court "that the 10 withheld photographs are 'graphic, explicit, and extremely upsetting,'" but the court expressed the view that one of the photographs at issue here, which had been published by *Time* magazine and showed a gun in Foster's hand, did not meet that description. *Id.* at 17. The court then remanded the case for the district court to review the photographs *in camera* and balance "the effect of their release on the privacy of the Foster family against the public benefit to be obtained by their release." *Ibid.*

Judge Pregerson agreed with the majority that Exemption 7(C) protects the privacy interests of surviving family members, Pet. App. 18, but filed a lengthy dissent disagreeing with the majority's remand of the case and its analysis of the asserted public interest in disclosure, *id.* at 18-44. He reasoned that the government's *Vaughn* index[1] was sufficiently comprehensive to make a remand for *in camera* review of the photographs unnecessary, *id.* at 25, and that the "pain and anguish" that Favish concedes petitioners would suffer, *id.* at 36, outweighs the public interest in obtaining the photographs to facilitate a sixth investigation into the cause of Foster's death, *id.* at 39-43.

5. On remand, the district court construed the court of appeals' opinion as permitting the withholding under Exemption 7(C) of only those photographs that are "graphic, explicit and extremely upsetting." Pet. App. 5 (citation omitted). The district court ordered release of five of the ten photographs, including the photograph that had been published in *Time* magazine.

6. The government appealed, and petitioners (the widow and sister of Vincent Foster) intervened on appeal. In a one-sentence, unpublished disposition, the court of appeals affirmed the district court's judgment insofar as it sustained the withholding of five of the photographs and required the release of four others. Pet. App. 2-3. The court held, however, that one photograph ordered released by the district court had been properly withheld by the Office of Independent Counsel. *Ibid.* Judge Pregerson dissented on the ground that the nine "never-before-released" photographs were properly withheld under Exemption 7(C). *Id.* at

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[1] See *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

3.[2] The court of appeals denied petitioners' and the government's petitions for rehearing and for rehearing en banc. Judge Pregerson would have granted panel rehearing. *Id.* at 4.

DISCUSSION

1. With respect to the matters covered by the first two questions presented by the petition, the government has filed its own petition for a writ of certiorari seeking review of the Ninth Circuit's decision in this case. *Office of Indep. Counsel* v. *Favish* (filed Dec. 20, 2002). The government argues that its petition should be held pending this Court's decision in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms [ATF]* v. *City of Chicago*, cert. granted, No. 02-322 (Nov. 12, 2002), which also involves the interpretation and application of FOIA Exemption 7(C), and then be disposed of as appropriate in light of the Court's decision in that case. For the same reasons, this petition for a writ of certiorari should also be held pending the Court's decision in *ATF* v. *City of Chicago*.

2. Petitioners also seek (Pet. 14-17) this Court's review of what they assert was the Ninth Circuit's holding that materials sought under FOIA must be "graphic, explicit, and extremely upsetting" before Exemption 7(C) will protect surviving family members' privacy interests, Pet. 14. That question does not warrant plenary review by this Court. Nowhere in the court of appeals' opinions did it hold that only "graphic, explicit, and extremely upsetting" materials may be protected under Exemption 7(C), either generally or in the particular context of survivor privacy claims. To

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[2] Judge Pregerson agreed with the ordered release of the one photograph published by *Time* magazine. Pet. App. 3.

the contrary, in recognizing a survivor right of privacy, the court of appeals stated in its original published opinion that "the expectable invasion" of "the memory of the deceased" would be balanced against the public interest in disclosure. Pet. App. 16. On that same page, the court again stated that disclosures that "violate that memory" of the deceased loved one invade the survivor's protected privacy interests. *Ibid.*

It was not until the next section of the Ninth Circuit's first opinion, when the court discussed the balancing of that *recognized* privacy interest against the asserted public interest in disclosure that the phrase "graphic, explicit, and extremely upsetting" appears in the opinion. Pet. App. 17. But even then the phrase was not of the court's own making; it was quoted from the argument of the Office of Independent Counsel: "The OIC represents that the 10 withheld photographs are 'graphic, explicit, and extremely upsetting.'" *Ibid.* The court of appeals never indicated that the Office of Independent Counsel's description of the photographs was anything more than that: a description.

Petitioners are correct (see Pet. 14) that the district court, on remand, said that "the appellate court appears to have defined the zone of privacy protection as those photographs that are 'graphic, explicit, and extremely upsetting.'" Pet. App. 5. But that single, non-precedential understanding of a court of appeals opinion by a district court does not amount to the type of entrenched inter-circuit conflict meriting this Court's review. Nor is the court of appeals' one-sentence, unexplained, and unpublished per curiam decision affirming the district court's judgment requiring release of the four photographs at issue here sufficient to transform purely descriptive language in the court of appeals' prior opinion into binding Ninth Circuit precedent.

The Ninth Circuit's decision therefore does not warrant review by the Court on that ground. Nonetheless, if this Court, following its decision in *ATF* v. *City of Chicago*, *supra*, grants the petition for a writ of certiorari in this case, vacates the judgment of the Ninth Circuit, and remands the case to the court of appeals for further consideration of the public interest side of the balance under Exemption 7(C), the Ninth Circuit will also have an opportunity to consider further the privacy side of the balance under Exemption 7(C) in this case.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *United States Department of the Treasury, Bureau of Alcohol, Tobacco & Firearms* v. *City of Chicago*, No. 02-322, and then be disposed of as appropriate in light of that decision.

Respectfully submitted.

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